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In the Supreme Court of the United States

OCTOBER TERM, 1976

CENTRAL BANK, PETITIONER

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

**MEMORANDUM FOR THE COMPTROLLER OF
THE CURRENCY IN OPPOSITION**

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
*Washington, D.C. 20530.***

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**MEMORANDUM FOR THE COMPTROLLER OF
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Petitioner seeks review of a decision upholding the issuance by the Comptroller of the Currency of a banking charter to the Tri City National Bank of West Allis.

The application to charter the new bank, to be located in West Allis, Wisconsin, was approved by the Comptroller in 1973 (Pet. App. 114). In 1970 the Comptroller had disapproved an application by some of the same parties to charter a bank in the same location (Pet. App. 107-108). Both applications proposed the establishment of a new national bank, to be affiliated by stock ownership with Tri City National Bank of Oak Creek and Tri City National Bank of Hales Corners (*id.* at 108). The 1970 application had been denied because the latter banks had not adequately established their base (Pet. App. 114). However, both banks had grown rapidly since 1970 (Pet. App. 108).

The 1973 application proposed (1) that stock of the new bank be offered on a pro rata basis to existing individual stockholders of the two existing banks in order to insure affiliation as required by the National Bank Act, 12 U.S.C. 221a; (2) that no individual or his interests would hold more than 5% of the stock of the new bank, but at least 50% of the shareholders of the existing banks would own stock in the new bank; and (3) that the balance of the stock would be offered to local and area businessmen and individuals (C.A. App. 27a).

Petitioner contested both applications at the administrative level, and each time was granted a hearing. In 1973, the Comptroller determined, upon the basis of an extensive administrative record, that the new bank should be approved. He noted briefly (C.A. App. 19a):

The banking organizers appear to have done a commendable job in the organization, development and management of two other national banks in the Greater Milwaukee Area.

While there are a number of banks in the general vicinity of the proposed bank, the institutions in the immediate trade area are state-chartered institutions.

The entry of a well-managed national bank should offer some useful competition and thus contribute to serving the convenience & needs of the public in the West Allis area.

I conclude that the application (on reconsideration) should be approved.

Petitioner then brought this action in the United States District Court for the Eastern District of Wisconsin, requesting declaratory and injunctive relief. The district

court granted defendants'¹ motion for summary judgment (Pet. App. 113-117). The court of appeals affirmed in a *per curiam* opinion upon which we rely (Pet. App. 107-112).²

1. Petitioner contends that the court of appeals "did not reach the issue" whether the new bank in this case was a branch and "never construed" the federal statutory definition of branch banking (Pet. 7, 9). The court of appeals, however, reached and correctly resolved these issues (Pet. App. 108-110). Following *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, the court of appeals first examined federal law to determine whether or not the new bank in this case was a "branch" of its affiliate banks. The court correctly distinguished cases dealing with holding companies rather than affiliates, on the ground that a holding company, unlike a mere affiliate, can exercise permanent and total control over the subsidiary. The court also noted that in those cases finding holding company subsidiaries to be branches, "there was direct evidence that the subsidiaries were to be integral parts of a unified banking operation" (Pet. App. 109). The court then relied on a consistent line of federal cases³ to conclude that "the West Allis bank is not

¹The defendants were the Comptroller of the Currency and the individual organizers of the proposed bank.

²The case was previously before the Seventh Circuit on an appeal from the district court's denial of a stay *pendente lite*. The court of appeals affirmed that denial on February 20, 1975.

³*Camden Trust Co. v. Gidney*, 301 F. 2d 521 (C.A. D.C.), certiorari denied, 369 U.S. 886; *American Bank of Tulsa v. Watson*, 391 F. Supp. 573 (N.D. Okla.) (mandate of affirmance stayed on other grounds *sub nom. American Bank of Tulsa v. Smith*, 503 F. 2d 784 (C.A. 10), subsequently affirmed, March 12, 1975); *Pineland State Bank v. Proposed First National Bank of Bricktown*, 335 F. Supp. 1376 (D. N.J.).

a branch of its affiliates" (Pet. App. 110). These cases hold that a new bank which is affiliated with an existing bank is not a branch of the existing bank, even if the new bank's affairs would be "conducted by the same management and under the same policies" as the existing bank. *Camden Trust Co. v. Gidney*, 301 F. 2d 521, 522, 523 n. 7 (C.A.D.C.), certiorari denied, 369 U.S. 886. The decision of the court of appeals in this regard is correct and does not warrant review by this Court.

2. The court of appeals was also correct in concluding (Pet. App. 110-112) that the Comptroller's decision did not frustrate judicial review. Under *Camp v. Pitts*, 411 U.S. 138, where the administrative record indicates the reasons for final agency action, even the absence of any specific findings by the Comptroller does not result in "such paucity of administrative explanation as would frustrate effective judicial review of the Comptroller's action." *Bank of Commerce of Laredo v. City National Bank of Laredo*, 484 F. 2d 284, 288 (C.A. 5), certiorari denied, 416 U.S. 905; see also *City National Bank v. Smith*, 513 F. 2d 479, 484-485 (C.A. D.C.). Here the Comptroller, after an extensive field investigation and public hearings (Pet. App. 116), noted the favorable record of the bank organizers in developing the affiliated banks and pointed out that introduction of a national bank "should offer some useful competition and thus contribute to serving the convenience & needs of the public in the West Allis area" (Pet. App. 111).⁴ This was a sufficient explanation of the

⁴Petitioner contends in this regard that the Comptroller failed to indicate that he considered whether the new bank would be a branch of the two affiliate banks (Pet. 7). As the court of appeals noted (Pet. App. 111, n. 2), this issue was not raised in the courts below (see Pet. 6). The contention is therefore not properly before this Court. *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn v. United States*, 355 U.S. 339, 362-363, n. 16.

basis of the Comptroller's decision to permit meaningful judicial review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.